

**TITLE 78 RECODIFICATION - TITLE 78B****CHAPTER 9**

2008 GENERAL SESSION

STATE OF UTAH

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**LONG TITLE****General Description:**

Title 78B, Chapter 9, Post-Conviction Remedies Act.

**Highlighted Provisions:**

This bill:

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**Monies Appropriated in this Bill:**

None

**Other Special Clauses:**

None

**Utah Code Sections Affected:****RENUMBERS AND AMENDS:**

**78B-9-101**, (Renumbered from 78-35a-101, as enacted by Laws of Utah 1996, Chapter 235)

**78B-9-102**, (Renumbered from 78-35a-102, as enacted by Laws of Utah 1996, Chapter 235)

**78B-9-103**, (Renumbered from 78-35a-103, as enacted by Laws of Utah 1996, Chapter 235)

**78B-9-104**, (Renumbered from 78-35a-104, as enacted by Laws of Utah 1996, Chapter 235)

**78B-9-105**, (Renumbered from 78-35a-105, as enacted by Laws of Utah 1996, Chapter 235)

**78B-9-106**, (Renumbered from 78-35a-106, as enacted by Laws of Utah 1996, Chapter 235)

**78B-9-107**, (Renumbered from 78-35a-107, as last amended by Laws of Utah 2004, Chapter 139)

32 **78B-9-108**, (Renumbered from 78-35a-108, as enacted by Laws of Utah 1996, Chapter  
33 235)

34 **78B-9-109**, (Renumbered from 78-35a-109, as enacted by Laws of Utah 1996, Chapter  
35 235)

36 **78B-9-110**, (Renumbered from 78-35a-110, as enacted by Laws of Utah 1996, Chapter  
37 235)

38 **78B-9-201**, (Renumbered from 78-35a-201, as renumbered and amended by Laws of  
39 Utah 1997, Chapter 76)

40 **78B-9-202**, (Renumbered from 78-35a-202, as enacted by Laws of Utah 1997, Chapter  
41 76)

42 **78B-9-301**, (Renumbered from 78-35a-301, as last amended by Laws of Utah 2007,  
43 Chapter 125)

44 **78B-9-302**, (Renumbered from 78-35a-302, as enacted by Laws of Utah 2001, Chapter  
45 261)

46 **78B-9-303**, (Renumbered from 78-35a-303, as enacted by Laws of Utah 2001, Chapter  
47 261)

48 **78B-9-304**, (Renumbered from 78-35a-304, as enacted by Laws of Utah 2001, Chapter  
49 261)

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51 *Be it enacted by the Legislature of the state of Utah:*

52 Section 1. Section **78B-9-101**, which is renumbered from Section 78-35a-101 is  
53 renumbered and amended to read:

54 **CHAPTER 9. POST-CONVICTION REMEDIES ACT**

55 ~~[78-35a-101].~~ **78B-9-101.** **Title.**

56 This act shall be known as the "Post-Conviction Remedies Act."

57 Section 2. Section **78B-9-102**, which is renumbered from Section 78-35a-102 is  
58 renumbered and amended to read:

59 ~~[78-35a-102].~~ **78B-9-102.** **Replacement of prior remedies.**

60 (1) This chapter establishes a substantive legal remedy for any person who challenges a  
61 conviction or sentence for a criminal offense and who has exhausted all other legal remedies,  
62 including a direct appeal except as provided in Subsection (2). Procedural provisions for filing

and commencement of a petition are found in Rule 65C, Utah Rules of Civil Procedure.

(2) This chapter does not apply to:

(a) habeas corpus petitions that do not challenge a conviction or sentence for a criminal offense;

(b) motions to correct a sentence pursuant to Rule 22(e), Utah Rules of Criminal Procedure; or

(c) actions taken by the Board of Pardons and Parole.

Section 3. Section **78B-9-103**, which is renumbered from Section 78-35a-103 is renumbered and amended to read:

~~[78-35a-103].~~ **78B-9-103. Applicability -- Effect on petitions.**

Except for the limitation period established in Section ~~[78-35a-107]~~ 78B-9-107, this chapter applies only to post-conviction proceedings filed on or after July 1, 1996.

Section 4. Section **78B-9-104**, which is renumbered from Section 78-35a-104 is renumbered and amended to read:

~~[78-35a-104].~~ **78B-9-104. Grounds for relief -- Retroactivity of rule.**

(1) Unless precluded by Section ~~[78-35a-106 or 78-35a-107]~~ 78B-9-106 or 78B-9-107, a person who has been convicted and sentenced for a criminal offense may file an action in the district court of original jurisdiction for post-conviction relief to vacate or modify the conviction or sentence upon the following grounds:

(a) the conviction was obtained or the sentence was imposed in violation of the United States Constitution or Utah Constitution;

(b) the conviction was obtained under a statute that is in violation of the United States Constitution or Utah Constitution, or the conduct for which the petitioner was prosecuted is constitutionally protected;

(c) the sentence was imposed in an unlawful manner, or probation was revoked in an unlawful manner;

(d) the petitioner had ineffective assistance of counsel in violation of the United States Constitution or Utah Constitution; or

(e) newly discovered material evidence exists that requires the court to vacate the conviction or sentence, because:

(i) neither the petitioner nor petitioner's counsel knew of the evidence at the time of

trial or sentencing or in time to include the evidence in any previously filed post-trial motion or post-conviction proceeding, and the evidence could not have been discovered through the exercise of reasonable diligence;

(ii) the material evidence is not merely cumulative of evidence that was known;

(iii) the material evidence is not merely impeachment evidence; and

(iv) viewed with all the other evidence, the newly discovered material evidence demonstrates that no reasonable trier of fact could have found the petitioner guilty of the offense or subject to the sentence received.

(2) The question of whether a petitioner is entitled to the benefit of a rule announced by the United States Supreme Court, Utah Supreme Court, or Utah Court of Appeals after the petitioner's conviction became final shall be governed by applicable state and federal principles of retroactivity.

Section 5. Section **78B-9-105**, which is renumbered from Section 78-35a-105 is renumbered and amended to read:

~~[78-35a-105].~~ **78B-9-105. Burden of proof.**

The petitioner has the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief. The respondent has the burden of pleading any ground of preclusion under Section ~~[78-35a-106]~~ 78B-9-106, but once a ground has been pled, the petitioner has the burden to disprove its existence by a preponderance of the evidence.

Section 6. Section **78B-9-106**, which is renumbered from Section 78-35a-106 is renumbered and amended to read:

~~[78-35a-106].~~ **78B-9-106. Preclusion of relief -- Exception.**

(1) A person is not eligible for relief under this chapter upon any ground that:

(a) may still be raised on direct appeal or by a post-trial motion;

(b) was raised or addressed at trial or on appeal;

(c) could have been but was not raised at trial or on appeal;

(d) was raised or addressed in any previous request for post-conviction relief or could have been, but was not, raised in a previous request for post-conviction relief; or

(e) is barred by the limitation period established in Section ~~[78-35a-107]~~ 78B-9-107.

(2) Notwithstanding Subsection (1)(c), a person may be eligible for relief on a basis

that the ground could have been but was not raised at trial or on appeal, if the failure to raise that ground was due to ineffective assistance of counsel.

Section 7. Section **78B-9-107**, which is renumbered from Section 78-35a-107 is renumbered and amended to read:

~~[78-35a-107].~~ **78B-9-107. Statute of limitations for postconviction relief.**

(1) A petitioner is entitled to relief only if the petition is filed within one year after the cause of action has accrued.

(2) For purposes of this section, the cause of action accrues on the latest of the following dates:

(a) the last day for filing an appeal from the entry of the final judgment of conviction, if no appeal is taken;

(b) the entry of the decision of the appellate court which has jurisdiction over the case, if an appeal is taken;

(c) the last day for filing a petition for writ of certiorari in the Utah Supreme Court or the United States Supreme Court, if no petition for writ of certiorari is filed;

(d) the entry of the denial of the petition for writ of certiorari or the entry of the decision on the petition for certiorari review, if a petition for writ of certiorari is filed; or

(e) the date on which petitioner knew or should have known, in the exercise of reasonable diligence, of evidentiary facts on which the petition is based.

(3) If the court finds that the interests of justice require, a court may excuse a petitioner's failure to file within the time limitations.

(4) Sections 77-19-8, 78-12-35, and 78-12-40 do not extend the limitations period established in this section.

Section 8. Section **78B-9-108**, which is renumbered from Section 78-35a-108 is renumbered and amended to read:

~~[78-35a-108].~~ **78B-9-108. Effect of granting relief -- Notice.**

(1) If the court grants the petitioner's request for relief, it shall either:

(a) modify the original conviction or sentence; or

(b) vacate the original conviction or sentence and order a new trial or sentencing proceeding as appropriate.

(2) (a) If the petitioner is serving a felony sentence, the order shall be stayed for five

days. Within the stay period, the respondent shall give written notice to the court and the petitioner that the respondent will pursue a new trial or sentencing proceedings, appeal the order, or take no action.

(b) If the respondent fails to provide notice or gives notice at any time during the stay period that it intends to take no action, the court shall lift the stay and deliver the order to the custodian of the petitioner.

(c) If the respondent gives notice that it intends to retry or resentence the petitioner, the trial court may order any supplementary orders as to arraignment, trial, sentencing, custody, bail, discharge, or other matters that may be necessary.

Section 9. Section **78B-9-109**, which is renumbered from Section 78-35a-109 is renumbered and amended to read:

~~[78-35a-109].~~ **78B-9-109. Appointment of counsel.**

(1) If any portion of the petition is not summarily dismissed, the court may, upon the request of an indigent petitioner, appoint counsel on a pro bono basis. Counsel who represented the petitioner at trial or on the direct appeal may not be appointed to represent the petitioner under this section.

(2) In determining whether to appoint counsel, the court shall consider the following factors:

(a) whether the petition contains factual allegations that will require an evidentiary hearing; and

(b) whether the petition involves complicated issues of law or fact that require the assistance of counsel for proper adjudication.

(3) An allegation that counsel appointed under this section was ineffective cannot be the basis for relief in any subsequent post-conviction petition.

Section 10. Section **78B-9-110**, which is renumbered from Section 78-35a-110 is renumbered and amended to read:

~~[78-35a-110].~~ **78B-9-110. Appeal -- Jurisdiction.**

Any party may appeal from the trial court's final judgment on a petition for post-conviction relief to the appellate court having jurisdiction pursuant to Section ~~[78-2-2 or 78-2a-3]~~ 78B-9-102 or 78B-9-103.

Section 11. Section **78B-9-201**, which is renumbered from Section 78-35a-201 is

187 renumbered and amended to read:

188 ~~[78-35a-201].~~ 78B-9-201. **Post-conviction remedies -- 30 days.**

189 A post-conviction remedy may not be applied for or entertained by any court within 30  
190 days prior to the date set for execution of a capital sentence, unless the grounds for application  
191 are based on facts or circumstances which developed or first became known within that period  
192 of time.

193 Section 12. Section **78B-9-202**, which is renumbered from Section 78-35a-202 is  
194 renumbered and amended to read:

195 ~~[78-35a-202].~~ 78B-9-202. **Appointment and payment of counsel in death**  
196 **penalty cases.**

197 (1) A person who has been sentenced to death and whose conviction and sentence has  
198 been affirmed on appeal shall be advised in open court, on the record, in a hearing scheduled  
199 no less than 30 days prior to the signing of the death warrant, of the provisions of this chapter  
200 allowing challenges to the conviction and death sentence and the appointment of counsel for  
201 indigent defendants.

202 (2) (a) If a defendant requests the court to appoint counsel, the court shall determine  
203 whether the defendant is indigent and make findings on the record regarding the defendant's  
204 indigency. If the court finds that the defendant is indigent, it shall promptly appoint counsel  
205 who is qualified to represent defendants in death penalty cases as required by Rule 8 of the  
206 Utah Rules of Criminal Procedure.

207 (b) A defendant who wishes to reject the offer of counsel shall be advised on the record  
208 by the court of the consequences of the rejection before the court may accept the rejection.

209 (c) Costs of counsel and other reasonable litigation expenses incurred in providing the  
210 representation provided for in this section shall be paid from state funds by the Division of  
211 Finance according to rules established pursuant to Title 63, Chapter 46a, Utah Administrative  
212 Rulemaking Act.

213 Section 13. Section **78B-9-301**, which is renumbered from Section 78-35a-301 is  
214 renumbered and amended to read:

215 ~~[78-35a-301].~~ 78B-9-301. **Postconviction testing of DNA -- Petition --**  
216 **Sufficient allegations -- Notification of victim.**

217 (1) As used in this part, "DNA" means deoxyribonucleic acid.

(2) A person convicted of a felony offense may at any time file a petition for postconviction DNA testing in the trial court that entered the judgment of conviction against him if the person asserts his actual innocence under oath and the petition alleges:

(a) evidence has been obtained regarding the person's case which is still in existence and is in a condition that allows DNA testing to be conducted;

(b) the chain of custody is sufficient to establish that the evidence has not been altered in any material aspect;

(c) the person identifies the specific evidence to be tested and states a theory of defense, not inconsistent with theories previously asserted at trial, that the requested DNA testing would support;

(d) the evidence was not previously subjected to DNA testing, or if the evidence was tested previously, the evidence was not subjected to the testing that is now requested, and the new testing may resolve an issue not resolved by the prior testing;

(e) the proposed DNA testing is generally accepted as valid in the scientific field or is otherwise admissible under Utah law;

(f) the evidence that is the subject of the request for testing has the potential to produce new, noncumulative evidence that will establish the person's actual innocence; and

(g) the person is aware of the consequences of filing the petition, including:

(i) those specified in Sections [~~78-35a-302 and 78-35a-304~~] 78B-9-302 and 78B-9-304; and

(ii) that the person is waiving any statute of limitations in all jurisdictions as to any felony offense he has committed which is identified through DNA database comparison.

(3) The petition under Subsection (2) shall be in compliance with Rule 65C, Utah Rules of Civil Procedure, including providing the underlying criminal case number.

(4) The court may not order DNA testing in cases in which DNA testing was available at the time of trial and the person did not request DNA testing or present DNA evidence for tactical reasons.

(5) After a petition is filed under this section, prosecutors, law enforcement officers, and crime laboratory personnel have a duty to cooperate in preserving evidence and in determining the sufficiency of the chain of custody of the evidence which may be subject to DNA testing.



(6) (a) A person who files a petition under this section shall serve notice upon the office of the prosecutor who obtained the conviction, and upon the state attorney general. The attorney general shall, within 30 days after receipt of service of a copy of the petition, or within any additional period of time the court allows, answer or otherwise respond to all proceedings initiated under this part.

(b) After the attorney general is given an opportunity to respond to a petition for postconviction DNA testing, the court shall order DNA testing if it finds by a preponderance of the evidence that all criteria of Subsection (2) have been met.

(7) (a) If the court grants the petition for testing, the DNA test shall be performed by the Utah State Crime Laboratory within the Criminal Investigations and Technical Services Division created in Section 53-10-103, unless the person establishes that the state crime laboratory has a conflict of interest or does not have the capability to perform the necessary testing.

(b) If the court orders that the testing be conducted by any laboratory other than the state crime laboratory, the court shall require that the testing be performed:

(i) under reasonable conditions designed to protect the state's interests in the integrity of the evidence; and

(ii) according to accepted scientific standards and procedures.

(8) (a) DNA testing under this section shall be paid for from funds appropriated to the Department of Corrections under Subsection 53-10-407(4)(a) from the DNA Specimen Restricted Account created in Section 53-10-407 if:

(i) the court ordered the DNA testing under this section;

(ii) the Utah State Crime Laboratory within the Criminal Investigations and Technical Services Division has a conflict of interest or does not have the capability to perform the necessary testing; and

(iii) the petitioner who has filed for postconviction DNA testing under Section ~~[78-35a-201]~~ 78B-9-201 is serving a sentence of imprisonment and is indigent.

(b) Under this Subsection (8), costs of DNA testing include those necessary to transport the evidence, prepare samples for analysis, analyze the evidence, and prepare reports of findings.

(9) If the person is serving a sentence of imprisonment and is indigent, the state shall

pay for the costs of the testing under this part, but if the result is not favorable to the person the court may order the person to reimburse the state for the costs of the testing, pursuant to the provisions of Subsections ~~[78-35a-302]~~ 78B-9-302(4) and ~~[78-35a-304]~~ 78B-9-304(1)(b).

(10) Any victim of the crime regarding which the person petitions for DNA testing, who has elected to receive notice under Section 77-38-3 shall be notified by the state's attorney of any hearing regarding the petition and testing, even though the hearing is a civil proceeding.

Section 14. Section **78B-9-302**, which is renumbered from Section 78-35a-302 is renumbered and amended to read:

~~[78-35a-302].~~ **78B-9-302. Effect of petition for postconviction DNA testing**  
**-- Requests for appointment of counsel -- Appeals -- Subsequent postconviction petitions.**

(1) The filing of a petition for DNA testing constitutes the person's consent to provide samples of body fluids for use in the DNA testing.

(2) The data from any DNA samples or test results obtained as a result of the petition may be entered into law enforcement DNA databases.

(3) The filing of a petition for DNA testing constitutes the person's waiver of any statute of limitations in all jurisdictions as to any felony offense the person has committed which is identified through DNA database comparison.

(4) The person filing the petition for postconviction DNA testing bears the cost of the testing unless:

(a) the person is serving a sentence of imprisonment;

(b) the person is indigent; and

(c) the DNA test is favorable to the petitioner.

(5) (a) Subsections ~~[78-35a-109]~~ 78B-9-109(1) and (2), regarding the appointment of pro bono counsel, apply to any request for the appointment of counsel under this part.

(b) Subsection ~~[78-35a-109]~~ 78B-9-109(3), regarding effectiveness of counsel, applies to subsequent postconviction petitions and to appeals under this part.

Section 15. Section **78B-9-303**, which is renumbered from Section 78-35a-303 is renumbered and amended to read:

~~[78-35a-303].~~ **78B-9-303. Consequences of postconviction DNA testing**  
**when result is favorable to person -- Procedures.**

(1) (a) If the result of postconviction DNA testing is favorable to the person, the person

may file a motion to vacate his conviction. The court shall give the state 30 days to respond in writing, to present evidence, and to be heard in oral argument prior to issuing an order to vacate the conviction. The state may by motion request an extension of the 30 days, which the court may grant upon good cause shown.

(b) The state may stipulate to the conviction being vacated, or may request a hearing and attempt to demonstrate through evidence and argument that, despite the DNA test results, the state possesses sufficient evidence of the person's guilt so that he is unable to demonstrate by clear and convincing evidence that he is actually innocent of one or more offenses of which he was convicted, and all the lesser included offenses related to those offenses.

(2) (a) If the result of postconviction DNA testing is favorable to the person and the state opposes vacating the conviction, the court shall consider all the evidence presented at the original trial and at the hearing under Subsection (1)(b), including the new DNA test result. Evidence that would otherwise have been suppressed at criminal trial is admissible, unless the evidence is an unconstitutionally coerced statement from the person.

(b) If the court, after considering all the evidence, determines that the DNA test result demonstrates by clear and convincing evidence that the person is actually innocent of one or more offenses of which the person was convicted and all lesser included offenses relating to those offenses, the court shall order that those convictions be vacated with prejudice and those convictions be expunged from the person's record.

(c) If the court, after considering all the evidence presented at the original trial and at the hearing under Subsection (1)(b), including the new DNA test result, finds by clear and convincing evidence that the person is actually innocent of one or more offenses of which the person was convicted, but the court does not find by clear and convincing evidence that the person is actually innocent of all lesser included offenses relating to those offenses, the court shall modify the original conviction and sentence of the person as appropriate for the lesser included offense, whether or not the lesser included offense was originally submitted to the trier of fact.

(d) If the court, after considering all the evidence presented at the original trial and at the hearing under Subsection (1)(b), including the new DNA test result, does not find by clear and convincing evidence that the person is actually innocent of the offense or offenses the person is challenging, the court shall deny the person's petition regarding the offense or

342 offenses.

343 (e) Any party may appeal from the trial court's final ruling on the petition under this  
344 part.

345 Section 16. Section **78B-9-304**, which is renumbered from Section 78-35a-304 is  
346 renumbered and amended to read:

347 **~~[78-35a-304].~~ 78B-9-304. Consequences of postconviction DNA testing**  
348 **when result is unfavorable to person -- Procedures.**

349 (1) If the result of postconviction DNA testing is not favorable to the person, the court  
350 shall deny the person's petition, and the court shall:

351 (a) report the unfavorable result to the Board of Pardons and Parole; and

352 (b) order the person to pay for the costs of the DNA testing unless the petitioner has  
353 already paid that cost.

354 (2) This section does not apply if the DNA test is inconclusive.